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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Federal Preemption of ) DA Number 02-1044  
Anne Arundel County Ordinance )  
Regulating Radio Frequency Interference )

To: Wireless Telecommunications Bureau,  
Commercial Wireless Division,  
Policy and Rules Branch

**COMMENTS OF ARRL, THE NATIONAL ASSOCIATION FOR AMATEUR RADIO,  
IN RESPONSE TO PETITION FOR DECLARATORY RULING**

ARRL, the National Association for Amateur Radio, also known as the American Radio Relay League, Incorporated (ARRL), by counsel, hereby respectfully submits its comments in response to the Public Notice entitled *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling That Amendments to Anne Arundel County, Maryland Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission* (the "Notice"), DA-02-1044, released May 7, 2002.

1. Cingular Wireless, LLC ("Cingular") seeks a declaratory ruling stating that amendments to Anne Arundel County's (the "County") zoning ordinance impermissibly conditions certain zoning approval by the County on the County's determination that facilities will not degrade or interfere with public safety communications systems owned by the County. Cingular states that the amendments are intended to regulate radio frequency interference ("RFI") and that the amendments therefore directly conflict with the FCC's exclusive jurisdiction over RFI matters.

2. ARRL agrees entirely with the Cingular Petition and its conclusion that the amendments to the County's zoning ordinance are impermissible and preempted because they conflict with the clearly established jurisdiction of the FCC over RFI matters.

3. No municipality has subject matter jurisdiction over RFI, or the interference potential of RF devices, or the continued operation of commercial or Amateur Radio stations licensed by the Commission, nor over radio interference phenomena generally.<sup>1</sup> Only the Federal Communications Commission has this jurisdiction.

4. The Communications Amendments Act of 1982, Public Law 97-259, which amended Section 302 of the Communications Act of 1934 (47 U.S.C. §302(a)) accorded FCC sole and exclusive jurisdiction over the susceptibility of home electronic equipment to radio frequency interference. In giving the FCC this jurisdiction, the Congress specifically, twice, in the Report of the Joint Committee of Conference, stated that only the FCC will have jurisdiction over matters involving RFI. The Congress stated:

The millions of purchasers of television and radio receivers and other home electronic equipment and systems each year deserve protection from interference. Significant reduction of interference from the multitude of complaints received each year by the Commission should result from enactment of this provision, as should lawsuits against amateur and other radio operators in local jurisdictions based on interference. Section 7 of the Conference Substitute is viewed by the Conferees as necessary to address adequately this increasing problem, which plagues so many of the nation's consumers. **Moreover, by virtue of this section, the Conferees wish to clarify that the exclusive jurisdiction over RFI (Radio Frequency Interference) incidents (including preemption of state and local regulation of such phenomena) lies with the FCC.**

H.R. Report No. 765, 97th Cong., 2nd Sess., at 33; Reprinted in 1982 U.S. Code Cong. & Ad. News, at 2267.

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<sup>1</sup> Anne Arundel County cannot regulate RFI when it acts as a governmental entity and enacts an ordinance like the one at issue here. However, when a government is a lessor of a tower, like any other private property owner, it could impose conditions that limit RF emissions. See *Sprint Spectrum L.P. v. Richard P. Mills*, 26 CR 158 (2nd Cir. 2002).

The same report reiterated the preemptive intent of Congress:

The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures, or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

*Id.*, 1982 U.S. Code Cong. & Ad. News, at 2277.

Cases since then have uniformly held nuisance and other suits brought in state or Federal courts premised on RFI to have been preempted. *Smith v. Calvary Educational Broadcasting Network*, 783 S.W. 2d 533 (MO App. 1990); *Blackburn v. Doubleday Broadcasting Co. Inc.*, 353 N.W. 2d 550 (MN 1984); and *Helm v. Louisville Two-Way Radio Corporation*, 667 S.W. 2d 691 (KY 1984); *Still v. Michaels*, 166 Ariz.403, 803 P. 2d 124 (Az. 1990). FCC has also held that it alone has jurisdiction over RFI incidents. See, *960 Radio, Inc.*; FCC 85-578, 1985 FCC Lexis 2342 (released November 4, 1985). Any and all regulation of Radio Frequency Interference (RFI), be it the result of interaction between amateur radio transmitters or other communications transmitters and RF-susceptible devices is the exclusive jurisdictional province of the Federal Communications Commission. *Broyde v. Gotham Tower, Inc.*, 13 F. 3d 994, 74 Pike & Fischer Radio Regulation (RR) 2d 640 (6th Cir. 1994). The FCC's jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive". *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, n.6 (1963). All courts that have considered common law nuisance claims based on RFI have determined that RFI is preempted by the Communications Act of 1934, as amended, 47 U.S.C. §§151-613. *Still v. Michaels*, 791 F. Supp. 248 (D. Ariz. 1992); *Still v. Michaels*, 803 P.2d 124 (Az. 1990).

The Federal Government has adopted a comprehensive scheme for the assignment of frequencies and the prevention of interference phenomena. [47 U.S.C. §§151 et seq.] [47 C.F.R. 97.73, 97.131, 97.133 (1981)]; See also, *Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal. App. 3d 841, 141 Cal. Rptr 85, 87 (1977), appeal denied, 435 U.S. 990 (1978). A local community may not legislate in this area.

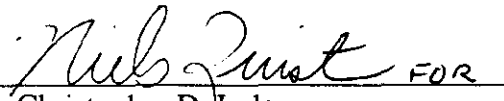
Additional comprehensive authority for the preemption of subject matter jurisdiction over RFI found in *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (Case No. 98-3264, 10th Cir. December 27, 1999). In that case, the United States Court of Appeals for the Tenth Circuit invalidated a Kansas county zoning regulation that permitted a county zoning administrator to determine that a communications tower or antenna was causing interference to public safety communications, and to order the site to cease operations. The county included a restriction tracking the terms of the regulation in a conditional use permit to construct a 150-foot tower to be used by SW Bell. Bell successfully sought a declaratory judgment that the regulation was preempted by federal law. On the county's appeal, the 10th Circuit affirmed, holding that Congress implicitly preempted the field and intended the FCC to have exclusive jurisdiction over RFI matters, leaving no room for local regulation of the subject. The Court held that Congress does sanction FCC preemption of RFI issues. RFI is a federal interest and requires a national approach to regulate the field. Hence, the county regulation and the related restriction in SW Bell's conditional use permit were void. The Circuit noted that its conclusion is "consistent with decisions of virtually all courts considering RFI preemption". This is followed by a string citation to many RFI preemption decisions from other courts. As Cingular points out, the *Southwestern Bell Wireless* case is almost identical to the ordinance adopted by Anne Arundel County.

Most recently, the U.S. Supreme Court denied a Petition for Certiorari seeking review of a decision of the Second Circuit U.S. Court of Appeals decision in an RFI jurisdiction case, *Freeman v. Burlington Broadcasters, Inc.*, 19 Pike & Fischer Communications Regulation 587 (2nd Cir., Case No. 97-9141, February 23, 2000). In that case, a condition on a use permit for a communications tower requiring the permittee to remedy radio frequency interference caused by signals from the tower to appliances and devices in local homes was void as preempted by Federal law. The 2nd Circuit stated: We conclude that allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

6. In sum, ARRL supports the Cingular Petition for Declaratory Ruling because case law and Congressional intent demonstrate that RFI matters are exclusively within the jurisdiction of the FCC and the County cannot attempt to regulate RFI under the guise of controlling land use. The Commission should therefore declare the subject ordinance preempted on its face.

Respectfully submitted,

**ARRL, THE NATIONAL ASSOCIATION  
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By:  FOR  
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June 10, 2002

## CERTIFICATE OF SERVICE

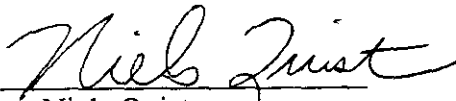
I, Niels Quist, hereby certify that I have this 10th day of June, 2002, caused a copy of the foregoing "Comments Of ARRL, The National Association For Amateur Radio, In Response TO Petition For Declaratory Ruling" to be sent, via First Class, United States Mail, prepaid to each of the following:

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